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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 219

REIES LOPEZ TIJERINA, CRISTOBAL LOPEZ TIJERINA, JERRY NOLL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered herein on February 14, 1969.

Opinions Below

Petitioners, with two others, were tried before a jury in the United States District Court for the District of New Mexico and convicted on December 18, 1967. The appeal to the Court of Appeals for the Tenth Circuit was

decided and an opinion confirming the convictions was entered on February 14, 1969. That opinion, a copy of which is attached hereto as Appendix A, is reported at 407 F. 2d 349. A petition for rehearing and for rehearing *en banc* was denied on April 10, 1969.

Jurisdiction

The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1). The judgment sought to be reviewed was entered on February 14, 1969. A petition for rehearing and for rehearing *en banc* was denied on April 10, 1969.

Questions Presented

1. Whether the conviction of political leaders of a peaceful demonstration based upon charges of alleged criminal action of participants in the demonstration, absent any evidence that the political leaders of the demonstration were in any way responsible for or induced the alleged actions, violates the First Amendment to the Constitution of the United States?

2. Whether the convictions of petitioners Reies Tijerina and Jerry Noll as "aiders and abettors", unsupported by any evidence in the record, violates the First Amendment to the Constitution of the United States within the context of this record?

3. Whether the convictions of petitioners violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States in that the record is entirely lacking in evidence to support the charge?

4. Whether it was plainly erroneous for the trial judge to refuse to charge the jury that specific intent was required to be shown under the Rule of this Court in *Morissette* v. *United States*?

5. Whether the indictment, either standing alone or as supplemented by the bill of particulars, fails to charge an offense against the United States?

6. Whether the government failed to prove any acts of conversion within the meaning of that term?

7. Whether the criminal prosecutions of petitioners, based upon their *bona fide* efforts to obtain a redress of grievances through peaceful activities seeking a lawful resolution of serious claims against the United States constitutes bad faith harassment of citizens for the exercise of constitutionally protected rights in violation of the First Amendment to the Constitution of the United States?

Statutes Involved

18 U.S.C. §2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §111. *Assaulting, resisting, or impeding certain officers or employees*

Whoever forcibly assaults, resists, opposes, impedes, intimidates or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. §641. *Public money, property or records*

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money or thing of value, of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

18 U.S.C. §1114. *Protection of officers and employees of the United States*

Whoever kills any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any post-office inspector, any officer or employee of the secret service or of the Bureau of Narcotics, any officer or enlisted man of the Coast Guard, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his du-

ties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands of the United States, or the District of Columbia, for the control or eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty in, the field service of the Bureau of Land Management, any employee of the Bureau of Animal Industry of the Department of Agriculture, or any officer or employee of the Indian field service of the United States, or any officer or employee of the Natoinal Aeronautics and Space Administration directed to guard and protect property of the United States under the administration and control of the National Aeronautics and Space Administration, any security officer of the Department of State or the Foreign Service, or any officer or employee of the Department of Health, Education, and Welfare designated by the Secretary of Health, Education, and Welfare to conduct investigations or inspections under the Federal Food, Drug, and Cosmetic Act while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under sections 1111 and 1112 of this title.

Statement of the Case

Petitioners were convicted on one or more counts of a five-count indictment relating to certain incidents which

occurred on October 22, 1966 at the Echo Amphitheater Camp Ground in the Carson National Forest, New Mexico.

The reason for their presence at the Echo Camp Ground is rooted in one of the more unfortunate chapters in the history of the Southwest. It concerns the unsuccessful attempts of the descendants of thirty-nine Spanish-American families, over the past century and a quarter, to establish what they and many authorities believe to be their rightful title to a large tract of land, situated in what is now New Mexico and known as the San Joaquin del Rio de Chama land grant. The history of this long frustrated claim is described in remarks inserted in the Congressional Record by Congressman Fernandez of New Mexico in 1944, which are set forth as Appendix B.

In recent years, the San Joaquin grant was taken up by an organization calling itself the Alianza Federal de Mercedes, of which petitioners are members. The Alianza has sought to enforce its claim, or at least obtain consideration thereof, in numerous peaceful appeals and petitions to the President, members of Congress, the Secretaries of State, Agriculture and Interior, and the Governor of New Mexico, all to no avail (Tr. 550-55, 1070, 1075, 1079-80, 1120-22, 1142, 1165, 1191-93, 1197).[1] All traditional methods of obtaining relief being exhausted, the Alianza was advised by counsel to commit an act of ejectment, as the sole means of gaining standing to obtain a judicial determination of their claim (Tr. 1144).

The instant case focuses upon a small portion of the contested land in the area designated as the Carson National Forest, known as the Echo Amphitheatre, located within the area originally part of the San Joaquin del Rio de Chama land grant.

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[1] References are to the typewritten transcript.

On October 15, 1966, one week before the events referred to in the indictment, the descendants of the San Joaquin grant gathered at Echo Amphitheatre, elected a Town Council (*ayuntamiento*) and appointed deputies (Tr. 1035-6, 1127-28, 1193-94, 1224-28, 1251) according to the Laws of the Indies which governed the original grants. The press was invited in an attempt to publicize the heirs' position and gain support (Tr. 1134, 1138; Exhibit P-15).

The persons attending the October 15 meeting shared the belief that the Echo Amphitheatre in the northern part of New Mexico was included within the San Joaquin del Rio de Chama grant, and, because the grant lands had never been properly alienated from the grantees and their descendants, the lands belonged to the heirs (Tr. 934, 944-46, 964, 991-2, 1028-30, 1071, 1095-96, 1102-09, 1124-32, 1191-93, 1262, 1277-81, 1289, 1314, 1319, 1634-40). In addition to a shared concern on the land grants issue, those people had common grievances concerning loss of grazing and water rights, decrease in animals, denial of permits, discriminatory treatment, public lands being fenced off, etc. (Tr. 919-21, 1010, 1013, 1035, 1043, 1061, 1067-72, 1241-45, 1268). At the October 15 meeting it was agreed that they would convene again on October 22 "to emphasize our problems and try to get solutions for them" (Tr. 1067). It was also decided that prior to the October 22, 1966, meeting there would be made a formal assertion of title with the Forest Service, the Justice Department and the President (Tr. 1135). These assertions were carried out and indeed the Forest Service by letter dated October 19, 1966 (Exhibit P-16) rejected such a claim.

Following the weekend of October 15, the Forest Service officials held a series of meetings to develop a plan of action for the anticipated return on October 22 of the land grant claimants (Tr. 563-64, 575-76, 626-29, 631, 661-65,

689, 693; Exhibit D-"C") in which "all possibilities" were discussed with United States Attorneys (Tr. 579-81, 627). Rangers Smith and Taylor were instructed to erect stop signs (Tr. 693, 864) for the first time at the entrance of the camp grounds and post the area indicating a fee was necessary for camping; the rangers did so about October 20 (Tr. 693) and were careful to take pictures of this posting (Tr. 663).

In formulating its plan, a key interest of the Government was to prevent the Alianza from using the civil channels of the federal court system to settle their grievances (Tr. 627, 631, 634-5) and to turn the matter into criminal channels.

> Any criminal action we plan was with a thought-up design [sic] in consultation with the attorney in charge of the office of the United States Attorney. The hope of the Alianza was to get a case in the United States Court. Our actions were with—against those individuals involved—and not the whole Alianza . . . We do not intend to aid them to get into the Court as an Association or Alliance (Tr. 627). (Report from Hurst, Forest Service Officer in charge, to Superiors; Exhibit D-"C."

The Forest Service was determined not to permit the settlement of a simple dispute of land title between the United States Government and its citizens in a civil suit, as it knew was the desire of the claimants and defendants (Tr. 627, 630-31, 938, 950-51, 966, 992, 1138-43, 1183, 1203).

Thus it was from this background of a civil dispute concerning land title and the determination of the government to switch the matter to a criminal prosecution that the specific events leading to these indictments for assault and conversion arose.

Early Saturday morning, October 22, 1966, there was gathered immediately outside the camp grounds a crowd of angry people from Northern New Mexico who expressed grievances against the Forest Service (Tr. 713-14, 730, 742, 786-87, 811-13, 1050-54). The assembled people were advised they would be in violation of the statutes if they entered the camp grounds without a permit, but that the rangers would not prevent them from entering (Tr. 811, 1052, 1060).

Some time later a caravan of cars and trucks approached from the south (Tr. 662-3, 810); the rangers moved onto the cattle guard and motioned the caravan to stop. With lights on and horns honking the caravan increased in speed, and the rangers had to jump out of the way to safety (Tr. 664, 810, 813). *No* government witness saw any of the defendants as part of this caravan (Tr. 700). And there is no testimony that either the angry crowd outside or the caravan were part of any group that had been organized by any of the defendants.

Once inside the camp grounds, the crowd became hostile and threatening toward the two rangers present, Walter Taylor and Philip Smith (Tr. 790-1, 811-12, 669, 780). There was no evidence whatever that any of the defendants contributed to this turn of events or that they approved in any way of ensuing developments. Some of the crowd apparently saw fit to conduct an on-the-spot "trial" of Taylor and Smith (Tr. 671, 799, 822-23). They were brought before petitioner Noll, who, conceiving that his functioning in some sort of "judicial" capacity might serve to cool tempers, found the rangers guilty of trespassing and told them they were free to leave. The crowd did in fact calm down in the presence of Noll (Tr. 798).

This was the entire extent of Noll's participation in the matter. Petitioner Reies Tijerina did not even participate

to that extent. He had nothing whatsoever to do with arranging of the "trial", or with its conduct. Neither petitioner Reies Tijerina nor petitioner Noll ever laid a hand on either Taylor or Smith who, incidentally, were completely unharmed; nor is there a shred of evidence that they urged anyone else to do so. While the record shows Cristobal Tijerina to have held Taylor for a moment, any fair reading of the record shows that he was in fact protecting him from an angry crowd (Tr. 979-80, 994, 1230-31).

Following the "trial", there was a confused episode lasting but a few minutes, in the course of which petitioner Noll briefly indicated that the rangers' two pickup trucks had been "impounded by the court", but almost immediately withdrew from that position. Noll did not touch either truck at any time.

The basic plan of the Alianza to bring about a legal proceeding to test title to the land was in fact successful. Within three days after the incident, on October 25th, the government filed a *civil* proceeding in the United States District Court entitled *U. S. A.* v. *Alianza Federal de Mercedes, and Reies Lopes Tijerina, Christ Tijerina, Jerry Noll, Al Chavez, and Ezikial Dominquez,* Civil Action No. 6870, in which it asserted title to the land and sought injunctive relief. The government brought on a motion for a restraining order on October 26, 1966. Such an order was issued and all affected persons left the amphitheatre. The litigation is still pending. The structuring of a suit to determine the knotty land questions was in fact the objective of the October 22nd meeting.

But the government was not satisfied to leave the matter to civil adjudication. It also brought criminal proceedings against the leader of the political movement and some of his associates and this petition is addressed to a conviction under those proceedings.

On the facts set forth above, all three petitioners, as well as two other defendants, Dominguez and Chavez, were tried on a five-count indictment, charging

I — assault against ranger Talyor

II — assault against ranger Smith

III — conversion of one pickup truck

IV — conversion of another pickup truck

V — conspiracy.

Reies Tijerina was found guilty of both assault counts, Cristobal Tijerina of the first assault count, Dominguez of the second assault count, and Noll and Chavez of both assault counts and both conversion counts. A mistrial was ordered on the conspiracy count.

The sentences, ranging from 60 days to three years, each with five years probation, are set out in footnote 2 of the opinion below.

The convictions were affirmed by the Court of Appeals, and a Petition for Rehearing and Rehearing *en banc* was denied.

Reasons for Granting the Writ

The writ should be granted because the court below has rendered a decision in conflict with applicable decisions of this court and with decisions of other courts of appeals upon an important issue of law, has decided an important question of federal law which has not been, but should be, settled by this court, and has sanctioned such a far-reaching departure by the district court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

All of this has been done in the context of one of the most serious threats to First Amendment rights to have come before this Court in recent years. This is essentially a political case, arising out of the bona fide efforts of a group of citizens who felt a heavy injustice weighing upon them and who had made repeated, but wholly unsuccessful, efforts to obtain a redress of their grievances by peaceful petitions to the authorities. Their attempt to create a peaceful protest situation in which the courts would have to pass on their claim was met by the government by an artifically created confrontation. Moreover, the government in this prosecution is attempting to proceed against the leaders of a political movement by seeking to hold them responsible as "aiders and abettors" for an alleged crime committed by members of a group when there is no evidence of connection between the leaders and the alleged criminal acts.

Petitioners were tried on a defective indictment, under a statute purportedly supplemented by a departmental regulation which was clearly *ultra vires* and of which defendants could not possibly have had knowledge. The indictments, and the convictions resulting therefrom, stretched such ordinary legal concepts as "conversion" and "aiding and abetting" out of all recognizable shape. The entire case smacks of harrassment and vindictiveness unbefitting the majesty of the United States government in its dealings with a group of justly aggrieved citizens. The net effect, if these convictions are to stand, is to cast a pall on the heretofore privileged exercise of First Amendment rights and to make the leaders of a political demonstration responsible for all of the acts of their followers.

I.

The convictions of petitioner Reies Tijerina, the leader of the demonstration, and Jerry Noll based solely upon charges of alleged criminal conduct of the participants in the demonstration, absent any evidence that they were responsible for or induced those actions, violate the First Amendment to the Constitution of the United States.

It is clear from the record that Reies Tijerina and Jerry Noll never laid hands on either Taylor or Smith and that in the case of Tijerina his participation in the entire incident leading to his conviction was limited to his presence in the general vicinity. In the case of Noll his sole participation was his functioning as a judge which served to calm the crowd. The circuit court's affirmance of his conviction rests exclusively on the two following statements:

1) Reies Tijerina and Noll were the "ringleaders of the mob"

2) Reies Tijerina, "the acknowledged leader of the Alianza, was in command of the mob and at the very least supported and countenanced the actions which resulted in the seizure of the rangers".

Thus it is conceded that neither Reies Tijerina nor Jerry Noll in any way touched the officers, and as far as Reies Tijerina is concerned, it is not even suggested that he took any action in respect to the so-called trial of the officers.

In *United States* v. *Peoni*, 100 F. 2d 401, 402 (C. A. 2, 1938), Judge Learned Hand, after a review of definitions of "aiding and abetting" in the English law, from the

14th century on down, concluded that they all demand that the aider and abettor "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed". Judge Hand's formulation has been adpoted by many courts, including this court in *Nye & Nissen* v. *United States*, 363 U.S. 613, 619 (1949) and has become the most authoritative definition of "aiding and abetting" in American law.

It is impossible to fit the opinion of the court below to the *Peoni* rule. There is no finding that Tijerina "by his action" sought to make the seizure of the rangers succeed. There *is* a finding that Tijerina "at the very least supported and countenanced *the actions which resulted in* the seizure of the rangers". This is "aiding and abetting" once removed. An aider and abettor under 18 U.S.C. 2 is a "principal in the second degree". *United States* v. *Moses*, 220 F. 2d 166 (C. A. 3 1955). If the decision below is allowed to stand, the Tenth Circuit will have created a new crime, that of "aiding and abetting in the second degree". Such cases as *Peoni*, *Moses*, *Grimes* v. *United States*, 379 F. 2d 791 (C. A. 5, 1967); *United States* v. *Garguilo*, 310 F. 2d 249 (C. A. 2, 1962), make it abundantly clear that participation in the crime by the aider and abettor must be direct, and that participation in some earlier activity which might or might not have led to the subsequent crime is not sufficient to sustain a conviction.

In *Grimes*, the Court of Appeals for the Fifth Circuit said, at p. 795:

> "The government proved that Grimes had every opportunity to become an aider and abettor but the proof is insufficient to establish that he actually became one".

It is equally settled that mere presence at the scene of a crime is not sufficient to make one an "aider and abettor". As Judge Friendly said in *Garguilo*, at p. 253:

> "knowledge that a crime is being committed, even when coupled with presence at the scene, is generally not enough to constitute aiding and abetting . . . Even in an age when solitude is so detested and 'togetherness' so valued, a jury could hardly be permitted to find that the mere furnishing of company to a person engaged in crime renders the companion an aider and abettor".

Aiding and abetting is a wholly different concept from merely supporting and countenancing. Aiding and abetting requires proof of conduct "amounting to counseling or other assistance in the prohibited activity." *Grimes* at p. 795. There must be "some conduct of an affirmative nature and mere negative acquiescence is not sufficient." *Johnson* v. *United States*, 195 F. 2d 673 (C. A. 8, 1952). "The mere fact that one is present at the scene of the crime, even though he may be in sympathy with the person committing it, will not render him an aider and abettor." *Ibid.*

But the Tenth Circuit, in its opinion below, has done more than stretch the concept of "aiding and abetting" beyond permissible limits. Such an erroneous interpretation of principles of criminal law is particularly noxious when applied to a situation in which First Amendment rights require protection. The court below has created a new doctrine concerning the responsibility of political leaders for the actions of their followers, which poses a most serious threat to the exercise of First Amendment freedoms.

Since Reies Tijerina neither instigated nor participated in the seizure of the rangers, the holding that he was properly convicted as an aider and abettor must rest on one of two theories:

1) Because he "supported and countenanced the actions which resulted in the seizure"—presumably, the demonstration at the Echo Amphitheater—he was criminally responsible for everything that took place in the course of the demonstration.

2) Because he was "a ringleader of the mob" and "in command of the mob", he was criminally responsible for everything done by "the mob", which he made no attempt to stop them from doing.

Either theory is antithetical to the Anglo-American notion of personal culpability for criminal behavior, and, if sanctioned by this court, is bound to have a chilling effect on the right of the people to assemble and petition for a redress of grievances.

Under the "Tijerina doctrine", as laid down by the court below, every leader of a march or demonstration, every person issuing a call for a public assembly, will have to consider whether he is prepared to face imprisonment following conviction as an aider and abettor of some offense committed, in his presence, by a member of the crowd, an offense of which he had no advance knowledge and the commission of which, more than likely, he would not have been able to stop even had he desired to do so.

In *NAACP* v. *Button*, 371 U. S. 415, 433 (1963), this court called attention to "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." The same warning, obviously, must be sounded

where, as this case, a statute which may or may not be inherently valid, has been sweepingly and improperly applied.

"These freedoms", as this court said in *NAACP* v. *Button*, at p. 433,

> "are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions . . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

It is difficult to imagine a more suffocating effect upon First Amendment freedoms, so far as public assemblies are concerned, than that flowing from the "Tijerina doctrine" propounded by the court below.

In any society which cherishes liberty and in which grievous injustices produce the serious expressions of public dissent which that liberty makes possible, there arise incidents which tempt the state to proceed by "overkill" against the dissenters and their leaders. Such is the government's conduct in this case; such was the crown's conduct in the celebrated case of Lord George Gordon.

Lord Gordon, as Chairman of the General Protestant Association, called a meeting in St. George's Field on June 2, 1780, to present a petition to Parliament for the repeal of Savile's Law, which the Association objected to as being "soft on Catholics". A crowd estimated at 60,000 gathered on the appointed day and, under the leadership of Lord Gordon, marched on Parliament. Later that evening, after Gordon had left, some members of the crowd went on a rampage which, with interruptions, lasted for

five days and resulted in much looting and burning, and several hundred deaths. Subsequently, Gordon was indicted for high treason, pursuant to an indictment charging that

> ". . . in the presence of a great multitude of persons . . . armed and arrayed in a warlike manner . . . (he) most wickedly, maliciously, and traitorously did ordain, prepare and levey public war against . . . the King." Lloyd Paul Stryker, *For the Defense,* 1947, p. 85

Thomas Erskine, then a relatively unknown young lawyer, argued, as junior counsel for Gordon, that

> "the only overt act charged in the indictment is the assembling of the multitude, which . . . went up with the petition of the Associated Protestants" *Id.* at p. 90

and that

> "the worst malice of his enemies has not been able to bring up one single witness to say that (Gordon) ever directed, countenanced, or approved rebellious force against the legislature of his country." *Id.* at p. 92

Gordon was acquitted, prompting Samuel Johnson to comment to his friend Boswell: "I am glad that Lord George Gordon has escaped, rather than a precedent should be established of hanging a man for constructive treason".

A century later, William Lecky, in his "History of England in the Eighteenth Century", was to observe, following his account of the "Gordon Riots":

> "Lord George Gordon was thrown into the Tower, and was tried before Lord Mansfield on the charge of high treason for levying war upon the Crown. The charge was what is termed by lawyers 'constructive treason'. It rested upon the assertion that the agitation which he had created and led was the originating cause of the outrages which had taken place." *Id.*, Vol. IV, p. 324.

In the instant case, the charge is not constructive treason, but what lawyers might describe as "constructive assault". If upheld, the consequences for public liberty would be equally dangerous. The conviction of petitioner Reises Tijerina has grave implications for the protection of fundamental liberties. The right to assembly is too precious a freedom to permit a resurrection of a doctrine, repudiated in the 18th Century, which would cast a pall upon the exercise of a liberty basic to a free society. *Cf.*, *Hague* v. *C.I.O.*, 307 U. S. 496 (1939); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965).

A careful application of the rules of aiding and abetting is especially important in the area of alleged criminal activity emerging from demonstrational activity of political dissidents who are doing nothing more than exercising their political rights.

By definition, political action—and especially demonstrational activity—involves large numbers of people. The notion that the leader of a political movement assumes responsibility for every errant act by any member of the protesting group is insidious and gravely threatens freedom of association.

II.

The convictions of petitioners violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States in that the record is entirely lacking in evidence to support the charge.

The evidence presented by both the prosecution and defense was that at no time did either defendant Reies Tijerina or defendant Noll touch either ranger nor urge anybody else, nor assist anyone else, in touching either ranger (Tr. 792, 800, 983, 1009, 1055-56, 1073-74). Indeed, as was noted, the prosecution witnesses agreed that defendant Tijerina's position was that the rangers were free to go (Tr. 673, 791, 849). State Police Captain Vigil testified defendant Tijerina was at all times cooperative (Tr. 784-5, 793-94, 979, 800). There was absolutely no interference with the New Mexico State Police (Tr. 803) or other persons present (Tr. 793, 803); the police made no arrests and were not interferred with in the conduct of their duties.

And as there is no evidence of Tijerina's or Noll's touching any of the rangers, there is equally no evidence that they caused or instigated, urged or counseled any other party to do so.

Even the identity of the different groups who came to the Echo Amphitheatre on that date is not established. There is no proof as to their relationship to the Alianza.

While Tijerina had made it that he called for a peaceful demonstration for the purpose of structuring a lawsuit, there is not a shred of evidence that he or any of the other petitioners here representd participated in any way in the train of events which caused the crowd to become angry and react against the rangers. And as to

the petitioners here represented, the evidence indeed was that as soon as that situation developed, they took steps to calm the crowd.

In this circumstance, the convictions of petitioners are void as a denial of due process of law in "that the record is entirely lacking in evidence to support any of the charges", *Thompson* v. *Louisville,* 362 U. S. 199, 204 (1960). As in *Thomson,* there is here "no evidence whatever in the record to support the conviction", 362 U. S. at 206. See also, *Garner* v. *Louisiana,* 368 U. S. 157 (1961); *Taylor* v. *Louisiana,* 370 U. S. 154 (1962).

It is completely clear that these criminal convictions are "void as a denial of due process of law", *Thompson* v. *Louisville,* 362 U. S. at 204, that there is "no evidence whatever in the record to support the conviction", 362 U. S. at 206, and that here, as in *Thompson,* "it [is] a violation of due process to convict and punish a man without evidence of his guilt." 362 U. S. at 206.

III

It was plainly error for the trial judge to refuse to charge the jury that specific intent was required to be shown under the rule of this Court in *Morissette* v. *United States.*

Nothing is clearer from the record in this case than that the leaders of the Alianza intended no criminal action. From beginning to end, the designed action was planned to place issue the legal title to the land. All testimony shows that defendant Reies Tijerina's intent, desire, actions and words have consistently been to determine title to contested lands peacefully and through civil action; he has at all times shunned the use of force (Tr. 950, 966, 1023, 1032, 1074, 1114, 1119-23, 1321).

University of Texas Professor Knowlton, who is an expert on land grant problems and has followed closely the work of Reies Tijerina, testified that in the potentially dangerous situation which exists in Northern New Mexico and was manifested at the camp grounds, Tijerina "would be more apt to try to tamp it down, rather than permit it to explode" (Tr. 950); he "would try to keep it under control, because [he] realize[s] that incidents like this would damage the reputation" (Tr. 950). Knowlton continued, "[A]t no time, to my knowledge, have I heard them say that 'We'll resort to violent methods.' They have always focused on 'We want to get a case in the Federal Courts, to get a Court decision that we hope will be favorable to us, and get our land back, or get compensation for our land like the American Indian got" (Tr. 951). Others who were present not only at the camp grounds but on many other occasions when defendant Tijerina spoke testified Reies Tijerina's goal is "to secure our land through lawful means" (Tr. 1074, 1082, 1321-22).

In short, defendant Reies Tijerina desired a civil suit to try title to the land; his lawyer had advised him and others the only way to achieve this was to camp on the property claimed by both the United States and the San Joaquin Pueblo (Tr. 1143-44). Consequently, the Pueblo, defendants, and others followed this advice. They anticipated being served with "show cause" papers inquiring why they should not be evicted from Echo Amphitheatre (Tr. 992, 1140-44). Tijerina informed the officers that the people refused to pay permits; he instructed the Rangers to inform their superiors that *"we'll be expecting a Court Order"* (Tr. 1210).

It is in the setting of the foregoing that we turn to the crucial question of intent and the court's instructions with respect thereto.

Counsel had made a series of requests designed in general to emphasize the requirement of willfulness and specific intent.

The court, however, made its charge, as follows:

> "Generally, it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done. So, unless the evidence in the case leads you to a different or contrary conclusion, you may draw the inference and find that the defendant intended all of the natural and probable consequences which one, standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act proven to your satisfaction to have been done—knowingly by him."

The decision of the lower court sustaining this charge is in clear conflict with the decisions of other Circuits and is in conflict with the decision of this Court in *Morissette* v. *United States,* 342 U. S. 246 (1952).

The Circuits are clearly divided on this issue which substantially affects the administration of federal criminal justice.

In its opinion in the instant case the Tenth Circuit attempts to ignore this conflict by stating that although the charge in issue "has been criticized", those cases are not apposite as *"in comparable circumstances,* other circuits have held that the giving of the questioned instruction was not reversible error."

Not only are the circuits divided, but we submit, the analysis given to this charge by the Fifth Circuit in *Mann* v. *United States,* 319 F. 2d 404, 407, 410 (5 Cir.,

1963), *cert. den.* 375 U. S. 986, and reaffirmed by that Circuit as recently as *Nagell* v. *United States,* 392 F. 2d 934 (5 Cir., 1968), is clearly correct and should be sustained by this Court.

In *Mann,* a charge virtually identical to the charge given below in this case was given and there was no objection raised by the defendant. The government attempted to bolster its position by contending that other portions of the charge rectified any error committed. The Fifth Circuit sets out the entire charge in that case—a charge most complete in dealing with the element of specific intent, at n. 3, at 407-408; however, in spite of other and further instructions on specific intent which were given by the court below, the Circuit held:

> ". . . the effect of that portion of the charge of which he complains was to make the jury aware of certain factual hypothesis and to instruct them that if they believed this hypothesis was established by the evidence, they were then authorized, absent opposing evidence, to infer that Dr. Mann's intent was tax evasion. This, he contends, is tantamount to an incriminating presumption which the jury, absent opposing evidence, could use as a substitute for proof. We agree." 319 F. 2d at 408.

The Fifth Circuit cited *Berkovitz* v. *United States* (5 Cir., 1954), 213 F. 2d 468; *Wardlaw* v. *United States* (5 Cir., 1953), 203 F. 2d 884; and *Bloch* v. *United States* (9 Cir., 1955), 221 F. 2d 786 as cases in which "identical charges, strikingly similar to the charge under consideration in the instant case. . . ." were reversed on appeal. *Id.* at 408.

The Fifth Circuit's rationale for reversing the conviction in *Mann* because of a lower court's charge was clear:

> "If the charge had ended when the jury was told that a person is presumed to intend the natural consequences of his own acts, when considered in the light of the charge as a whole, there would have been no error. When the words, 'So unless the contrary appears from the evidence' were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove a lack of intent. . . . Such a burden is especially harmful when a person is required to overcome a presumption as to anything subjective, such as intent or wilfullness, and a barrier almost impossible to hurdle results.
>
> * * *
>
> Even though the trial judge did give an accurate charge on the necessity of intent and the burden of proof, we hold that to leave the jury with that part of the charge complained of in this case was not cured by what was said elsewhere in the charge." 319 F. 2d at 409-410

The Eighth Circuit in *Imholte* v. *United States* (8 Cir., 1955), 226 F. 2d 585 stated, citing *Morissette* v. *United States, supra; Block* v. *United States, supra* and *Wardlaw* v. *United States, supra*, that "[t]hese cases establish the proposition that where intent is a necessary element of the offense, is not inherent in the act itself, but is a specific intent involving bad purpose and evil motive, that that specific intent must be proved by or clearly inferred from the evidence [citing *Wardlaw*], and the proof of such intent as an ingredient of the offense may not be eliminated by a presumption [citing *Morissette*]." 226 F. 2d at 590-591.

Other circuits reversing because of the utilization of this charge include *United States* v. *Barash* (2 Cir., 1966),

365 F. 2d 395, 402-403; and *Chappell* v. *United States* (9 Cir., 1959), 270 F. 2d 274, 279.*

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* The cases cited by the Tenth Circuit as offering "comparable circumstances" are clearly distinguishable. They all pay lip service to *Mann* but turn on their own unique objective facts or the nature, type and extent of the other jury instructions. Even these cases strenuously criticize the charge although they do not reverse. See, *e.g. United States* v. *Releford* (6 Cir. 1965), 352 F. 2d 36, 40, cert denied, 382 U. S. 984 ("clumsy and inartistic").

In *United States* v. *Wilkins* (4 Cir. 1967), 385 F. 2d 465, cert. denied 390 U. S. 951, the court pointed out that the trial court specifically instructed that "the law never imposes upon a defendant in a criminal case the burden or duty of producing *any evidence*. . . . Now as I told you, *there is no duty on the defendant to produce any evidence.*" (Emphasis supplied by Circuit Court) at 473-474.

Helms v. *United States* (5 Cir. 1964), 340 F. 2d 15, 18-19, cert. denied 382 U. S. 814 further explains the Fifth Circuit's decision in *Mann*. The court rejected the government's position that "the *Mann* case was wrongly decided and should be overruled." 340 F. 2d at 18. In *Mann* the defense was that defendant did not intend to evade the tax. He denied wilfull conduct or that he had an evil motive or intent. *Helms* presented the opposite extreme. The government's key witness testified that he was instructed by the defendant to prepare double sets of records and false tickets. As the *Helms* court pointed out, ". . . in the *Mann* case the purely mental state was the crucial issue while here the contest centers about objective conduct, the preparation of two sets of records and the use of false tickets in making defendant's income tax returns." 340 F. 2d at 18-19.

The "objective conduct" as opposed to "mental state" distinction in *Helms* is also apparent in *Moore* v. *United States* (8 Cir. 1967), 375 F. 2d 877, 880-882, cert. denied, 389 U. S. 844. There the defendant did not deny the charge, passing counterfeit bills, but denied knowledge that they were counterfeit. But defend-

(*Footnote continued on following page*)

It is clear from the above that a major division exists in the Circuits on this question. The only Circuit which presents a real analysis of the distinction in the cases is the Fifth Circuit, in its holdings in *Mann, Helms,* and *Nagell,* all *supra.* In *Nagell, supra,* the Circuit reaffirmed *Mann* and distinguished *Helms.* In *Helms* ". . . we observed that 'in the *Mann* case the purely mental case was the crucial issue while here the contest centers about objective conduct'. . . . In the present case we cannot divorce the concept of 'objective conduct' from that of 'mental state' since the insanity of Nagell has from the start been clearly at issue. We thus cannot legitimate the in-

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(Footnote continued from preceding page)

ant testified that when "challenged for passing one allegedly spurious bill . . . he tore the bill in half and made restitution with a genuine bill. This is hardly the reaction to be expected from one innocent of knowledge that a bill he passed was counterfeit." 375 F. 2d at 880.

The other cases cited by the lower court to sustain its holding are cases in which no independent analysis of the problem is presented by the Court. *United States* v. *Releford* (6 Cir. 1965), 352 F. 2d 36, 40, cert. denied, 382 U. S. 984, simply adopts *United States* v. *Denton* (6 Cir. 1964), 336 F. 2d 785, 788, because the "proof of guilt was strong as it is here." 352 F. 2d at 40. *Denton, supra,* itself produces no judicial reasoning, and although acknowledging *Mann,* simply adopts *Sherwin* v. *United States* (9 Cir. 1963), 320 F. 2d 137, cert. denied, 375 U. S. 964. However, in *Sherwin* the court points out, by way of distinguishing another Ninth Circuit case, *Bloch* v. *United States, supra,* that this charge "came fairly early in the course of a lengthy and extended charge. The charge occupies 40 pages in the record . . ." 320 F. 2d at 149. The *Sherwin* court makes constant references back to other parts of the charge incorporating specific intent, and states that "in view of this massive repetition of the instructions with respect to the requirement of proof of wilfullness, and of specific intent . . ." (320 F. 2d at 150) it will not reverse.

ference of specific intent—a mental state—from the at least ambiguous conduct of Nagell in the bank." 392 F. 2d at 938, p. 3.*

As the facts in the present petition clearly show, this was not an "objective conduct" situation where, for example, the testimony showed two sets of records and false tickets in a tax case, *Helms, supra,* or a defendant who admitted passing counterfeit money, although denying knowledge that it was counterfeit, but when challenged on one attempt to pass the money tore it up and presented genuine currency, *Moore, supra.* Here the petitioners were attempting to try title to land which they believed to be theirs. They believed the rangers were trespassers on their land. Their "state of mind" could not possibly turn on "objective conduct". This is a case like *Mann, supra.* It is clear accordingly that the rule of law followed by the Fifth Circuit and other Circuits should have been applied in the trial of petitioners. The petition should be granted to resolve this important conflict among the Circuits.

Furthermore, the charge given by the district court was in clear violation of the rule established by this Court in *Morissette* v. *United States, supra.*

The teaching of this Court in *Morissette* is wholly dispositive here:

> "We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the

* Nagell's conduct consisted of going into a bank, asking a teller for $100.00 in travellers checks, pulling out a gun, saying, "Lady, this is a real gun", and firing two shots into the wall when she ran.

> jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit. *Tot* v. *United States,* 319 U. S. 463."
>
> *Morissette, supra,* at 275.

This requirement of specific intent is particularly essential in a case which touches the protected areas of the First Amendment. *Hartzel* v. *United States,* 322 U. S. 680 (1947). In *Hartzel* the Court pointed out that in this sensitive arena "thoughtlessness, carelessness, and even recklessness are not substitutes for the more specific state of mind . . ." 322 U. S. at 689.

The decision of the lower court is thus in clear conflict with other Circuits and with the applicable decisions of this Court.

IV

The indictment failed to charge an offense under 18 U.S.C. Sec. 111.

A

Petitioners were charged with violating 18 U. S. C. 111, which makes it a crime to assault "any person designated in §1114 of this title while engaged in or on account of the performance of his official duties". 18 U. S. C. 1114,

inter alia, to officers or employees of the Department of Agriculture "designated by the Secretary of Agriculture . . . to enforce any act of Congress for the protection, preservation, or restoration of game and other wild birds and animals".

The indictment failed to state that the persons allegedly assaulted, forest rangers Taylor and Smith, were within the class of employees of the Department of Agriculture defined in 18 U. S. C. 1114, or that, at the time of the alleged crimes, they were engaged in the performance of official duties described in 18 U. S. C. 1114.* It was thus fatally defective. Not even the consistently liberal interpretation accorded by the courts in recent years to Rule 7 of the Federal Rules of Criminal Procedure can save an indictment which utterly fails to state, directly or indirectly, two of the essential elements of the alleged crime.

The court below was plainly in error in holding that the indictment "covers the elements of the offense", since it merely identified Rangers Taylor and Smith as "officer(s) of the Forest Service, United States Department of Agriculture . . . engaged in the performance of (their) official duties".

It is not an offense, under 18 U. S. C. 111, to assault *any* officer of the Forest Service, but only (1) certain types of officers designated in 18 U. S. C. 1114, (2) while engaged in the performance of the duties mentioned therein. On the reasoning of the court below, the indictment would have been sufficient had it merely charged

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* The language of the indictment was that the defendants "wilfully did forcibly assault, resist, oppose, impede, intimidate, and interfere with Walter Taylor, an officer of the Forst Service, United States Department of Agriculture, knowing him to be such officer, while the said Walter Taylor was engaged in the performance of his official duties."

petitioners with assaulting an individual named Taylor and an individual named Smith, without further identification, since, in the words of the court, this would have apprised each accused "of the nature of the offense so that he may adequately prepare a defense".

It is clear, however, that, for an indictment to be sufficient, it must meet two separate and distinct requirements: It must "contain the elements of the offense to be charged *and* sufficiently apprise the defendant of what he must be prepared to meet". *United States* v. *Debrow,* 346 U. S. 374, 376 (1953).

The court below erroneously equates the inclusion in an indictment of "essential facts" with the statement of "essential elements" of a crime. This is like saying that an indictment for mail fraud is sufficient when it merely alleges that, on a certain day, A posted a letter to B, without describing or characterizing the contents of such letter.

The government sought to overcome the insufficiency of the indictment by alleging, in its response to the Motion for a Bill of Particulars, that, at the time of the alleged offenses, Taylor and Smith were engaged in the administration of the Land and Water Conservation Fund Act of 1965 and the Multiple Use-Sustained Yield Act of 1960. "But it is a settled rule that a bill of particulars cannot save an invalid indictment." *United States* v. *Russell,* 369 U. S. 749, 769 (1961).

We will establish below that even if the *Russell* rule were ignored, the bill of particulars in the instant case could not have cured these indictments.

At this point, however, it should be noted that the omission in the indictments herein is not technical but fundamental, as the briefest reference to the history of the statute will show.

Assaults on federal employees generally are *not* federal crimes. The assault laws of the states are relied upon to protect federal employees, as to protect any other American citizen. The legislative history of 18 U. S. C. 1114 shows that Congress rejected a proposal to make assaults against all federal employees a federal crime. H.R. Rep. No. 1593, 73d Cong. 2d Sess. (1934). The purpose of the statute was narrow and specific, namely, to protect personnel of the United States government charged with investigative and law-enforcement duties, such as marshals, postal inspectors, Secret Service operatives and immigration inspectors, and then only when engaged in the performance of such duties. In the words of Attorney General Homer Cummings:

> "The Federal Government should not be compelled to rely upon the courts of the states, however respectable and well disposed, for the protection of its investigative and law-enforcement personnel." S. Rep. No. 533, 73d Cong., 2d Sess. (1934); H.R. Rep. No. 1455, 73d Cong., 2d Sess. (1934).

What is now Sec. 1114 was amended, in 1936, to include

> "any officer or employee of the Department of Agriculture designated by the Secretary of Agriculture to enforce any act of Congress for the protection, preservation, or restoration of game and other wild birds and animals. . . ." Act of Feb. 8, 1936, ch. 40, 49 Stat. 1105.

This amendment, according to Attorney General Cummings, was "in response to a very urgent need in the administration of the Bureau of Biological Survey of the Department of Agriculture." H.R. Rep. No. 827, 74th Cong., 1st Sess. (1935). No doubt, the intention was to

put teeth into the government's then fledgling efforts in the field of animal conservation, by providing it with a weapon against uncooperative hunters, fishermen and other deliberate or careless enemies of wildlife preservation.

Thus the occupation or designation of the particular federal employee and the work that he was doing at the particular time are indeed the crucial elements of the offense. The failure of the indictment to charge that the employees were within the terms of the statute therefore omits its most critical element.

B

The failure of the indictment to charge the crucial element of the offense in this case is in truth not a matter of oversight, as a more detailed inspection of the occupational status of the employees affected reveals.

The government's claim in the court below was that Taylor and Smith came within the purview of the statute by virtue of an administrative order issued by the Secretary of Agriculture on August 22, 1940 providing at "all the officers and employees of the Forest Service assigned to duty in the field service" were designated

> "to enforce Acts of Congress, and regulations promulgated pursuant thereto, for the protection, preservation, or restoration of game and other wild birds and animals or lands under the jurisdiction of the Forest Service." 5 Fed. Reg. 2940.

There are two reasons why the above designation is invalid:

1. Reorganization Plan No. II, issued in 1939, transferred the Bureau of Biological Survey to the Department of the Interior and provided that

> "The functions of the Secretary of Agriculture relating to the conservation of wildlife, game and migratory birds are hereby transferred to and shall be exercised by, the Secretary of the Interior. The provisions of the Act of May 18, 1934 (c. 299, 48 Stat. 780), as amended by the Act of February 9, 1936 (c. 40, 49 Stat. 1105) [the criminal statutes at issue here], insofar as they relate to officers or employees of the Department of Agriculture designated by the Secretary of Agriculture to enforce any act of Congress for the protection, preservation, or restoration of game and other wildlife and animals shall apply to officers and employees of the Department of the Interior designated by the Secretary of the Interior to exercise and discharge such duties." 1939 Reorg. Plan No. II, 4(f), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433. Reorganization Plan No. II, 5 U. S. C. A. App. p. 144.

Thus the Secretary of Agriculture, effective as of July 1. 1939, no longer had jurisdiction over the employees he purported to certify on August 22, 1940.

The fact that the predecessor of Sec. 1114, including the 1936 wildlife amendment, was reenacted by Congress subsequent to the passage of Reorganization Plan No. II and prior to the publication of the 1940 designation by the Secretary of Agriculture, cannot possibly mean, as the court below suggests, that such reenactment overrode the functional effect of the Reorganization Plan. It is much more likely that, just as the Secretary of Agriculture overlooked, for four years, the need to implement the 1936 amendment by designating the employees to whom it was to apply, so Congress, in reenacting the 1936 amendment after the passage of Reorganization Plan No. II, overlooked the fact that the Secretary of Agriculture

no longer had jurisdiction over the preservation and restoration of wildlife.

2. The effect of Reorganization Plan No. II aside, the terms of the 1940 designation by the Secretary of Agriculture far exceed the original intent of Congress in passing the 1936 amendment. That amendment, as has been shown, was intended to assist the Bureau of Biological Survey in the conservation of wildlife. The basic 1934 statute—now Sec. 1114—was intended to be limited to certain investigative and law-enforcement personnel of the United States Government. Suddenly, in 1940, by designation of the Secretary of Agriculture, *all* officers and employees of the Forest Service assigned to field duty, i.e., all officers *and employees* of the Forest Service located outside of Washington, D. C., are placed in the special class of persons protected by 18 U. S. C. 111, by the simple expedient of charging all such persons with the enforcement of Acts of Congress for the conservation of wildlife.

A comparison of the text of the original 1934 statute with the 1940 designation will show how far the Secre- of Agriculture in 1940 strayed from the intent of Congress. The 1934 statute—Act of May 18, 1934, ch. 299, §§253, 254, 48 Stat. 780—covers any United States marshal or deputy marshal, not any secretary working in a United States marshal's office; any Special Agent of the Division of Investigation of the Department of Justice, not any stock clerk employed by such Division; any Secret Service operative, not any telephone operator employed by the Internal Revenue Service.

Why, then, should the 1940 designation of the Secretary of Agriculture, which was purportedly made pursuant to the 1936 amendment to the original 1934 version of Sec. 1114, cover any secretary, stock clerk, telephone

operator or laborer employed in the field by the Forest Service? Can such "employees" properly be charged with "the enforcement of laws"? In other words, is not the 1940 designation—quite apart from the effect of Reorganization Plan No. II—clearly *ultra vires?*

We respectfully suggest that the failure of the indictment to allege the crucial element of the offence (the designation of Taylor and Smith) reflected the government's uncertainty as to the validity of the designations and its desire not to have the indictment depend upon the validity of the designations.

C

The defect of the indictment takes on even greater meaning in the light of the government's unusual efforts to press 18 U. S. C. 1114 into service when there is in fact another statute clearly intended to deal with the kind of situation presented by this case. We refer to 16 U. S. C. 551, under which the Secretary of Agriculture has issued a regulation specifically prohibiting assault upon "any person engaged in the protection, improvement or administration of the National Forests." 36 C.F.R. E 261.1.

Violations of this regulation are subject to much smaller maximum penalties than those provided for by 18 U. S. C. 111: $500 and six months' imprisonment in the former, as opposed to $5,000 and three years in the latter. In reaching for the higher penalty, the government has overreached itself.

It is this statute and regulation which generally cover misconduct of persons using the National Forests. The regulations are generally available and their force is known. The designation of the Secretary of Agriculture of August 22, 1940 is not only *ultra vires;* it is not sub-

ject to location except by most unusual research. It was never incorporated in the Code of Federal Regulations! (Perhaps, though no one can be certain, the codifiers of the Federal Regulations realized that because of Reorganization Plan No. II, the Secretary of Agriculture did not have jurisdiction to issue the regulation.)

V

Apart from the *Russell* rule, the bill of particulars did not save the indictment.

Even if the rule in *United States* v. *Russell* were ignored, and the bill of particulars accepted as an integral part of the indictment, the latter would still be defective. The bill merely stated that, on October 22, 1966, Officers Taylor and Smith were enforcing the Land and Water Conservation Act of 1965 and The Multiple Use-Sustained Yield Act of 1960. As the very names of these laws indicate, they are hardly "acts for the protection, preservation and restoration of game and other wild birds and animals", nor does the bill of particulars allege, or the opinion of the Circuit Court find, that they are such. To say that they are is in fact like saying that Chapter 2 of Title 16, which consists of Sections 471 through 527 and is titled "The National Forests—Establishment and Administration", is "a chapter for the protection and preservation of religion and education" because Sec. 479 allows settlers residing in the vicinity of a National Forest to maintain schools and churches within such National Forest.

It is out of this maze of laws and regulations, passing each other like ships in the night, that the government has sought to construct a case supporting the conviction

of petitioners. It is a cornerstone of our system of justice that criminal statutes are to be construed narrowly, and not endowed with a dragnet quality which their authors never intended and which can be justified only by the most labored and vindictive interpretation.

VI

The incident involving the two government trucks did not constitute conversion.

Petitioner Noll was convicted on two counts of conversion involving two pickup trucks owned by the government. The record shows that, following the "trial" of Taylor and Smith, they were permitted to take their personal property from the two trucks in question, but were told by Noll's fellow-defendant Chavez that they could not take the trucks, because they had been "impounded by the judge", *i.e.*, Noll. Within a few minutes, Reies Tijerina arrived on the scene and informed Forest Supervisor Seaman that the rangers were free to take the trucks. This was immediately confirmed by Noll. At no time did Noll lay hands on, or otherwise exercises control over, the trucks.

The indictment charged the defendants with converting the trucks "to their own use". Nothing in the record supports such a charge.

Under the rule enunciated by this court in *Morrissette* v. *United States*, 342 U. S. 246, 263 (1952), Congress, in borrowing terms of art from "the legal tradition and meaning of centuries of practice", must be presumed to have adopted "the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken."

Professor Prosser, in *The Nature of Conversion*, 42 Cornell L. Q. 168 (1957) states that

> "conversion has been confined, in effect, to those major interferences which are so important, or serious, as to justify the forced judicial sale of the chattel to the defendant."

Similarly, Sec. 222A of the *Restatement of Torts*, defines conversion as

> "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel."

The confused incident involving the trucks, lasting less than ten minutes, falls far short of meeting the above test and the court below was clearly in error in holding that "the record discloses a . . . conversion within the meaning of 18 U.S.C. 641".

VII

The criminal prosecutions of petitioners grounded upon their *bona fide* efforts to obtain a redress of grievances constitutes bad faith harassment of citizens for the exercise of constitutionally protected rights in violation of the First Amendment.

The criminal prosecutions of the petitioners based upon their *bona fide* efforts to obtain a redress of grievances through peaceful activities seeking a lawful resolution of serious claims against the United States constitutes bad faith harassment of citizens for the exercise of constitu-

tionally protected rights in violation of the First Amendment. *Dombrowski v. Pfister*, 380 U. S. 479 (1963); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496 (1939).

The record in this case, as the lower court concedes, reveals that the petitioners were engaged in legitimate effort to obtain a redress of serious grievances. As the lower court concludes they "sought publicity through a public demonstration and a confrontation with federal officials". After numerous unsuccessful appeals and petitions to the President of the United States, members of Congress, the Secretaries of State, Agriculture and Interior, as well as the Governor of New Mexico, see Statement of Facts, *supra*, petitioners were advised by counsel to commit a formal act of ejectment as the sole remaining means of obtaining a legal forum to receive a judicial determination of their serious land claims. The respondents were determined to frustrate this peaceful effort of petitioners to obtain this judicial resolution of their long standing grievances against the government. As the Forest Officer in charge indicated, his purpose was to frustrate petitioners' aim "to get a case in the United States Court."

On this record, the utilization of federal criminal processes merely to punish citizens for attempting to exercise the fundamental right to petition their government for a redress of grievances is a serious infringement of the commands of the First Amendment. *Cf. Dombrowski* v. *Pfister, supra.* In *Dombrowski* the Court directed the intervention of federal equity power to prevent "a plan to employ arrests, seizures and threats of prosecution under color of the statutes to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro

citizens of Louisiana", 380 U. S. at 482. This petition brings before the Court a situation in which *federal* criminal power has been used to "employ arrests . . . and threats of prosecution under color of [federal] statutes to harass [petitioners] and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of" Spanish-American citizens of New Mexico. *Cf. Dombrowski* v. *Pfister, supra.* This utilization of federal criminal power to harass and intimidate citizens in their exercise of fundamental constitutional rights presents a classic situation requiring the intervention of this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the U. S. Court of Appeals for the Tenth Circuit

(Filed—February 14, 1969.)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 10031-10035—JANUARY TERM, 1969

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

REIES LOPEZ TIJERINA, CRISTOBAL LOPEZ TIJERINA, JERRY NOLL, EZEKIAL DOMINGUEZ and ALFONSO CHAVEZ,

Defendants-Appellants.

APPEAL FROM THE UNITED DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

(DISTRICT COURT No. 23-112)

John Quinn, United States Attorney (*John A. Babington,* Assistant United States Attorney, was with him on the brief) for Plaintiff-Appellee.

Morton Stavis (*Beverly Axelrod, Albert Gonzales, Arthur Kinoy, William M. Kunstler,* and *William L.*

Higgs, Of Counsel, were with him on the brief) for Defendants-Appellants Reies Lopez Tijerina, Cristobal Lopez Tijerina and Jerry Noll.

Joseph H. Mercer for Defendant-Appellant Ezekial Dominquez.

Robert C. Poole for Defendant-Appellant Alfonso Chavez.

Before MARVIN JONES,* Judge, United States Court of Claims, and BREITENSTEIN and HICKEY, Circuit Judges.

BREITENSTEIN, Circuit Judge .

The defendants-appellants were jointly charged in a five-count indictment and all were found guilty by a jury on one or more counts. The appeals are from the judgments imposing sentence.

The first count charged an assault on forest ranger Taylor, an official of the Forest Service, Department of Agriculture in violation of 18 U.S.C. §§111 and 2. The second count charged a similar assault on forest ranger Smith. The third count charged the conversion of a 1962 Dodge truck, the property of the United States, in violation of 18 U.S.C. §§641 and 2. The fourth count charged a similar conversion of a 1965 Dodge truck. The fifth count charged conspiracy.

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* Sitting by designation.

Appendix A

Reies Tijerina was found guilty of the two assault counts. Cristobal Tijerina was found guilty of the first count charging an assault on ranger Taylor.[1] Dominguez was found guilty on the second count charging an assault on the ranger Smith. Noll and Chavez were convicted on the two assault and the two conversion counts. On the conspiracy count the jury disagreed and the court ordered a mistrial.[2]

The charges grew out of a demonstration on October 22, 1966, at the Echo Amphitheatre Camp Ground in the Carson National Forest, Rio Arriba County, New Mexico. The demonstration was arranged by an organization known as Alianza Federal de Mercedes to publicize the grievances and claims of a group of Spanish Americans. Reies was the leader and spokesman of Alianza. The complaints of Alianza were twofold. The first was based on the assertion that many Spanish Americans were wrongfully deprived of rights to Spanish and Mexican

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[1] Hereinafter Reies Tijerina will be referred to as Reies and Cristobal Tijerina as Cristobal.

[2] The court imposed the following sentences: Reies, two years on Count One with parole eligibility to be determined under 18 U.S.C. § 4208(a)(2); five years probation on Count Two; Cristobal, two years on condition that he be confined six months in a jail-type institution, suspension of remainder of sentence, and five years probation; Noll, three years each on Counts Two, Three, and Four with the sentences to run concurrently, and five years probation on Count One; Dominguez, two years on Count Two on condition that he be confined in a jail-type institution for 60 days, suspension of remainder of sentence, and five years probation; and Chavez two years each on Counts One, Two, Three, and Four to run concurrently, on condition that he be confined 60 days in a jail-type institution, suspension of remainder of sentence, and five years probation.

land grants guaranteed by the Treaty of Guadalupe Hidalgo.[3] The second was based on the denial or limitation of grazing permits issued by the federal government.

The events with which we are concerned began with an Alianza news release signed by Reies and stating that on October 15 a caravan would take over the Pueblo San Joaquin del Rio de Chama. The place for this action was to be the Echo Amphitheatre Camp Ground (Echo) which is located in the National Forest and several miles removed from the San Joaquin del Rio de Chama Grant.[4] On October 15, a group assembled at Echo but no government officials or reporters were present.

On October 19, Reies and a group of his followers went to the office of the regional forester in Albuquerque. A professional process server attempted to serve on the regional forester a notice signed by Reies saying that the heirs of the grants "shall exercise all of their rights and authorities whatever they might be within their respective

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[3] 9 Stat. 922. This 1848 treaty ended the war between the United States and Mexico and ceded certain territory to the United States. The treaty provided, 9 Stat. 929, that property rights of Mexicans in the ceded area "shall be inviolably respected." Before the treaty, large areas in what is now the southwestern part of the United States had been granted to individuals by Spain, and later by Mexico. Congress established procedures for the ascertainment of rights to such grants and their confirmation by Congress. A confirmatory act of Congress is final as to the nature and validity of a grant and is not subject to judicial review. See Sanchez v. Taylor, 10 Cir., 377 F. 2d 733, 736-737, and cases there cited.

[4] Reies testified that Echo was selected because "it was a public place, and it was in good position, where tourists would go by, and easy for reporters to approach."

jurisdictions forthwith" and that the repeated violations of international law by the United States "must cease once and for all time." The regional forester refused to accept the notice and gave Reies a letter saying that in the use of a National Forest camp ground there must be compliance with the applicable rules and regulations "including the possessing of a Land and Water Conservation Fund entrance card."[5]

On October 22, a caravan of cars carrying about 300 people approached the Echo entrance. Rangers Taylor and Smith, who were unarmed, attempted to stop the cars and collect the entrance fee. For their own safety they were required to jump away. They were able to collect no entrance fees. An angry and threatening crowd gathered inside the camp ground. Amidst shouts of "Matelo" and "Cuelgenlo,"[6] rangers Taylor and Smith were seized by defendants Cristobal, Dominguez and Chavez and physically forced to a table at which Noll was sitting. Noll, acting as a judge, told the rangers that they were charged with trespassing and being a nuisance.[7] During these proceedings, Reies was standing on the table to which the rangers were brought. His actions were such that it is a reasonable inference that he was in charge of the proceedings.

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[5] See 16 U.S.C. § 460[L]-4 to [L]-11 and Executive Order No. 11200, 30 Fed. Reg. 2645. See also 16 U.S.C. § 528. The daily fee for the Echo site was $1.00 per car.

[6] The quotes are from the testimony of defendant Chavez. He said that they meant "kill him" and "hang him."

[7] Noll was acting as a judge on the pretense that he had been elected to that position by the residents of the Pueblo San Joaquin del Rio de Chama.

Appendix A

After the rangers were permitted to leave the table, they started to take down license numbers. They were seized again and were told by Reies that they would be arrested again if they did not leave. The rangers were then permitted to take personal belongings from their trucks but were not allowed to take the trucks. Noll and Chavez told them that the trucks were impounded. On the departure of the rangers, armed guards, wearing badges, were stationed at the entrance to Echo. Later a captain of the New Mexico state police told the forest supervisor that he could get the trucks but the supervisor declined to do so because of fear of the angry and unruly crowd. Reies had told the captain that they did not want the trucks and that the trucks should not have been impounded. The record is unclear as to when the trucks were recovered but it was sometime after the departure of the crowd.

Photographers and reporters were present to observe what occurred at Echo. Reies, testifying in his own behalf, said that when standing on the table :

> "I was observing everything that was going to the news media, the TV and the newspaper; that was my interest, what would go out. * * * my interest was what was going out, what the world would know, or the state."

Both still and moving pictures were taken and one reel of moving pictures was accompanied by a sound track. Some of the pictures were introduced in evidence. They show a noisy, unruly, threatening mob in a high state of emotional excitement. They display the rough manhandling of the rangers and the force used to take them before Noll.[8]

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[8] At the trial the rangers identified from the pictures the activities of the individual defendants.

Appendix A

A five-count indictment was returned against the defendants on March 16, 1967. At that time the United States District Court for the District of New Mexico was using the key-man system, to secure names for the jury wheel. Because of attacks made against the system, the court changed to random selection from voting lists. After the change, a new indictment containing identical charges were returned by a grand jury chosen under the new method for placing names in the wheel. At the trial Reies, Cristobal and Noll were represented by retained counsel and Dominguez and Chavez by appointed counsel.

The defendants say that Counts One and Two of the indictment are insufficient because they fail to set forth all of the elements of the offense charged.[9] Section 111, Title 18 U.S.C., provides for the punishment of a person who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with a person designated in section 1114 of this title while engaged in or on account of the performance of his official duties." Section 1114, Title 18 U.S.C., covers "any officer or employee of the Department of Agriculture * * * designated by the Secretary of Agriculture to enforce any Act of Congress for the protection, pres-

[9] Count One reads: "On or about the 22nd day of October, 1966, at Echo Ampitheatre Camp Ground, Carson National Forest, Rio Arriba County, in the State and District of New Mexico, the defendants, * * * wilfully did forcibly assault, resist, oppose, impede, intimidate, and interfere with Walter Taylor, an officer of the Forest Service, United States Department of Agriculture, knowing him to be such officer, while the said Walter Taylor was engaged in the performance of his official duties. In violation of 18 USC 111 and 18 USC 2." The second count differed only in the reference to Smith rather than Taylor.

ervation, or restoration of game and other wild birds and animals."

The argument of the defendants is that the indictment should allege that the rangers had been designated by the Secretary to enforce acts of Congress for the protection of game and wild birds and, at the time of the assault, were acting pursuant to such acts. We believe that the indictment is sufficient. As required by Rule 7(c), F. R. Crim. P., it is "a plain, concise and definite written statement of the essential facts constituting the offense charged." It is specific as to time, place, and identity of person assaulted. It charges that the person assaulted was known to be an officer and was engaged in the performance of his official duties. This covers the elements of the offense and apprises the accused "of the nature of the offense so that he may adequately prepare a defense."[10] No more is required.

In response to an appropriate motion, the government filed a Bill of Particulars stating that the official duties of the rangers were the protection, improvement and administration of the National Forest pursuant to the Land and Water Conservation Act of 1965, 16 U.S.C. §460 (L)-4 to (L)-11, 78 Stat. 897, and the Multiple-Use Sustained-Yield Act, 16 U.S.C. §528-531, 74 Stat. 215, and that the duties to be performed were under regulations promulgated pursuant to those acts. Although in our opinion no bill of particulars was needed to save the indictment, the bill contained the information necessary to enable the defendants to prepare for trial. Indeed, nothing argued by

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[10] Clay v. United States, 10 Cir., 326 F. 2d 196, 198, cert. denied 377 U. S. 1000.

the defendants persuades us that the indictment had any defect affecting their substantial rights.[11]

Intermixed with the attack on the indictment are defense arguments that the forest rangers were not within the coverage of §111. That section refers to the persons mentioned in §1114. The latter section includes officers and employees of the Department of Agriculture "designated" by the Secretary to enforce an act of Congress for the protection and preservation of game, wild birds and animals. On August 20, 1940, by virtue of the authority given by 54 Stat. 391, a predecessor of what is now §1114, the Secretary of Agriculture designated all officers and employees of the Forest Service assigned to field duty "to enforce Acts of Congress, and regulations promulgated pursuant thereto, for the protection, preservation, or restoration of game and other wild birds and animals on lands under the jurisdiction of the Forest Service." This designation was published in the Federal Register on August 22, 1940, and has never been revoked.[12]

Defendants say that the Secretary had no power to make the designation because in 1939 under Reorganization Plan No. II the Bureau of Biological Survey had been transferred from the Agriculture to the Interior Department. The answer is that the predecessor of §1114 was reenacted after the shift and the Secretary acted un-

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[11] See Rule 52(a), F. R. Crim. P., and Russell v. United States, 369 U. S. 749, 763.

[12] See 5 Fed. Reg. 2940. The claim of the defendants that the failure to publish the designation in the Code of Federal Regulations makes the designation unenforceable is of no import. The statute, 44 U.S.C. § 307, makes publication in the Federal Register the basis of the presumption of validity, constructive notice, and judicial notice.

der the new law. The rangers, as officers assigned to field duty, were within the designation by the Secretary and the coverage of §1114. For the protection of the National Forest and the preservation of wild life therein and under the direction of their superiors they acted officially to enforce the Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§460 (L)-4 to (L)-11, the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§528-531, and the regulations thereunder.[13] Among their duties was the collection of the entrance fee at Echo.

Defendants object to the fact that the trial was held in Las Cruces. New Mexico constitutes one judicial district which is not separated into divisions. Las Cruces is desnated as a place where court shall be held.[14] The court and the parties were concerned with pretrial publicity and the impanelling of an impartial jury. The defendants were arraigned on September 29, 1967. On October 5, 1967, the court fixed Las Cruces as the place of trial.[15] On October 20, the defendants filed a motion for the transfer of the proceedings to another district and suggested

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[13] The government introduced exhibits describing the scope of the duties and responsibilities of the rangers. At the time of the Echo events the rangers were each acting within that scope.

[14] 28 U.S.C. § 111.

[15] In so doing the court said: "It is the judgment of the Court that it would be in the interest of a fair trial for the case to be tried at Las Cruces. In recent months there have been matters reported involving some of the defendants which have been of wide public interest, very particularly so in the area of Albuquerque and the northern portion of the state. At various hearings, some of the counsel have expressed concern as to the possibility of a fair trial due to the extent of public interest."

New York, Chicago, or San Francisco. The court denied the motion saying that it was not timely under Rule 22, F. R. Crim. P., and "otherwise not well taken."

The trial was held in the state and district where the offenses were committed.[16] Nothing shows that the defendants were prejudiced by a trial in Las Cruces. They are in no position to complain about the convenience of witnesses when they suggested a transfer to distant, out-of-state points. We believe that the court acted with commendable care and caution in assuring a fair and impartial trial.

All of the defendants attack the sufficiency of the evidence. The evidence shows the physical force exerted on Taylor by Cristobal and Chavez and on Smith by Dominguez and Chavez. The rangers were assaulted, resisted, intimidated, and prevented from performing their official duties. Reies and Noll were the ringleaders of the mob. Reies, the acknowledged leader of Alianza, was in command of the mob and at the very least supported and countenanced the actions which resulted in the seizure of the rangers. Noll was the pretended judge who affirmatively exercised control over the rangers after they had been forcibly brought before him. Reies and Noll were aiders and abettors who are guilty as principals under 18 U.S.C. §2. The claim that the defendants were trying to protect the rangers from the threatening mob was submitted to the jury under proper instructions and resolved against the defendants.

Noll ordered the impounding of the trucks and Chavez carried out Noll's order by preventing the rangers from

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[16] See U. S. Const. Art. III, Section 2, and Rule 18, F. R. Crim. P.

taking the federally owned trucks. By their acts they deprived the rangers of the power to exercise control over the trucks and acquired that power for themselves and the group of demonstrators.[17] The record discloses a wrongful interference with government property and a conversion within the meaning of 18 U.S.C. §641.[18]

The defendants say that the instruction on specific intent was erroneous because it shifted the burden of proof on the issue of intent. The pertinent portion of the instructions reads:

> "Generally, it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done. So, unless the evidence in the case leads you to a different or contrary conclusion, you may draw the inference and find that the defendant intended all of the natural and probable consequences which one, standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act proven to your satisfaction to have been done knowingly done by him."

The instruction is substantially the same as that appearing in Mathes, Jury Instructions and Forms for Fed-

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[17] See United States v. DeNormand, 2 Cir., 149 F. 2d 622, 624, cert. denied 326 U. S. 756.

[18] See Morissette v. United States, 342 U. S. 246, 271-272, where it is said that "[c]onversion, however, may be consummated without any intent to keep" and that "'[k]nowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversion."

eral Criminal Cases, 27 F. R. D. 39, 78. This instruction has been criticized.[19] In the case at bar no objection was made to the instruction and our problem is whether under Rule 52(b), F. R. Crim. P., there is plain error which affects substantial rights and requires reversal. We think not. On the whole the instructions on intent were adequate. The court instructed that the burden was on the government to prove the intent of each defendant individually. The proof of guilt is clear and convincing. The instructions fully satisfy the requirements of *Morissette* v. *United States*, 342 U. S. 246, relative to intent in conversion cases. In comparable circumstances, other circuits have held that the giving of the questioned instruction was not reversible error.[20] We agree.

Other attacks on the instruction deserve little consideration. The instruction relating to the good character evidence was in accord with our decisions in *Oertle* v. *United States*, 10 Cir., 370 F. 2d 719, 726-727, and in *Swingle* v. *United States*, 10 Cir., 389 F. 2d 220, 222. The defense of good character was merely incidental to the prime defense of no criminal intent. The instructions on the assault counts fully presented the elements of the

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[19] See Mann v. United States, 5 Cir., 319 F. 2d 404, 407, 410, cert. denied 375 U. S. 986; Imholte v. United States, 8 Cir., 226 F. 2d 585, 591; and United States v. Barash, 2 Cir., 365 F. 2d 395, 402-403.

[20] See United States v. Wilkins, 4 Cir., 385 F. 2d 465, 473-474, cert. denied 390 U. S. 951; Helms v. United States, 5 Cir., 340 F. 2d 15, 18-19, cert. denied 382 U. S. 814; United States v. Releford, 6 Cir., 352 F. 2d 36, 40, cert. denied 382 U. S. 984; Moore v. United States, 8 Cir., 375 F. 2d 877, 880-882, cert. denied 389 U. S. 844; and Sherwin v. United States, 9 Cir., 320 F. 2d 137, 148-150, cert. denied 375 U. S. 964.

crime which have been discussed previously in connection with the indictment. The instructions on conversion are consistent with the treatment on conversion in *Morissette* v. *United States,* 342 U. S. 246. Taken as a whole, the instructions fairly and adequately presented the issues to the jury.

Defendants urge that a pamphlet, Exhibit 32,[21] was irrelevant and improperly received in evidence. No prejudice resulted. The pamphlet was confirmatory of the comprehensive background evidence of the defendants, which the court permitted, and repetitive of the extensive testimony of Reies relating to the objectives of Alianza.

Other points are argued in the prolix briefs. Some of them border on frivolity and none of them require any discussion. These defendants sought publicity through a public demonstration and a confrontation with federal officials. They got all three. In accomplishing those objectives they violated federal laws and must suffer the consequences.

The judgments are severally affirmed.

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[21] The pamphlet was entitled "The Spanish Land Grant Question Examined by The Alianza Federal de Mercedes."

APPENDIX B

Excerpts from Congressional Record

Bill introduced May 11, 1944

Vol. 90—Part 3—p. 4368

PRIVATE BILLS AND RESOLUTIONS

Under clause 1 of rule XXII, private bills and resolutions were introduced and severally referred as follows:

By Mr. BEALL:

H. R. 4796. A bill granting a pension to Nina G. Givens; to the Committee on Pensions.

By Mr. FERNANDEZ:

H. R. 4797. A bill to require conveyance of certain lands in the San Joaquin del Rio de Chama grant (in the State of New Mexico), and reserving minerals and other interests therein; to the Committee on the Public Lands.

Vol. 90—Part IV—p. 4468—May 12, 1944

I cannot agree that it did; I cannot agree that this Government is without authority and without desire to do justice in the premises; and I believe this Congress upon investigation will feel as I do.

A total of approximately 351 families are on those lands, now restricted to the point of starvation, all in the face of the fact that the policy of Congress with respect to other community land grants had been liberal and just, and that it had recognized the community grants to lands in common.

The bill I have introduced may be quite imperfect. It may need complete redrafting. It may need amending in

various respects to protect the Government's interest and yet do substantial justice. But it is my sincere hope that it may serve as the vehicle through which this problem can be brought to the attention of the Congress and fully investigated through machinery available only to the Congress and far beyond the reach of those old families settled there by the Spanish Government long before Mexican or American rule.

When and if the Congress does, as I sincerely believe this American Congress will, investigate and fully delve into all the history of the San Joaquin del Rio de Chama communities, and the equities in their favor, we shall, whatever the result is, be satisfied. But those good people whose sons have fought in the Spanish-American War, in the First World War, and in this war, and numbers of whose sons are now prisoners of war in the hands of the Japanese, will never, never feel satisfied unless and until this Government of ours does pay heed to their petition for redress, and does look into all the facts with patience and sympathetic understanding. I shall insert in the RECORD at a later date data that will enable the Congress to judge a little better the importance of a hearing—an early one—and complete investigation and action.

Mr. Fernandez: Mr. Speaker, I ask unanimous consent to extend my remarks in the RECORD at this point.

The Speaker: Is there objection to the request of the gentleman from New Mexico?

There was no objection.

SAN JOAQUIN DEL RIO DE CHAMA GRANT

Mr. Fernandez. Mr. Speaker, in the great press of work which year after year is brought before the Con-

gress by the stress of problems calling for immediate solution, other problems as old as the hills unavoidably remain unnoticed in the background until the small voices of those affected, like a cry in the wilderness, make but little or no impression.

Such is the fate of a large number of old families in the State of New Mexico who, if they remain unheeded and their problem unattended, will in the not-too-distant future end in calamity.

Very briefly, and rather sketchily at this time I want to give you some of the facts, in connection with a bill which I have introduced—a bill conveying certain lands to the children of children of the first settlers thereon, and who through the years in good faith have believed that that land belonged to them, but to which they have had no title from this Government despite the good intentions of our Nation as expressed in the treaty of Guadalupe-Hidalgo.

Under that treaty, this Government undertook to protect fully the rights of the then settlers of what became the Territory of New Mexico. In carrying out that intention in good faith, the Congress recognized and confirmed various Spanish and Mexican land grants to individuals and to communities as such. Between 1854 and 1870 the Congress confirmed some 62 such grants.

In the vast majority of those confirmed up to that time, and of those confirmed later, the Congress and the Court of Claims did a good job. But because of certain unfortunate circumstances, in some instances it unwittingly fell short of its full responsibility in carrying out the expressed intention and responsibility assumed by this great Nation.

Appendix B

In its zeal to observe the obligations undertaken by the Treaty of Guadalupe-Hidalgo, the Congress, among other grants, undertook to recognize what is now known as the Maxwell Land Grant to two individuals, Guadalupe Miranda, a former citizen of Mexico, and Carlos Beaubien, a Canadian who settled in Taos, N. Mex., just prior to the American occupation.

To these two men a tract of the best and most beautiful land in northern New Mexico and southern Colorado embracing 1,714,764.93 acres was given through the act of Congress confirming an alleged grant from the Government of Mexico.

For many years these two men did not attempt to occupy the land and the matter went unnoticed by the people for some years. I shall not undertake to express an opinion on the action of Congress in respect to that grant, but the fact remains that by 1870 so much criticism had been aroused that Congress stopped short with respect to other grants then pending, and the reaction from the confirmation of this vast territory to two men was such that the Congress then swung to the other extreme, as it often happens in such cases, much to the damage of many bona fide grantees.

Among these was the claim of a group of families established in Rio Arriba County, N. Mex., under a Spanish grant prior to Mexican rule and American sovereignty. The Spanish Government had set aside for these families and their descendants a large tract of land known by direction of the granting authority tiself as the "San Joaquin del Rio de Chama." Under their claim, known as Land Claim No. 71, the Department of the Interior, through the Surveyor General, made a survey of the grant

in 1878, and the survey was approved, submitted to the Congress and the Committee on Public Lands reported out a bill confirming the grant to them.

However, the Congress did not act; but the families remained under the impression that their land had been approved by their new government as surveyed and for many years remained ignorant of the fact that they had not received confirmation of their grant. To this very day, the plat duly approved by the Surveyor General is exhibited by many of them under the impression that the land was theirs, so recognized by their American Government, and that through intricacies beyond their comprehension the Government later took over the land and claimed it as its own.

The fact of the matter is that the grant was not confirmed as approved by the Surveyor General and by the Committee on Public Lands of the Forty-seventh Congress which had it under consideration but that it was relegated to a newly established Court of Private Land Claims—taken there by the action of certain interests who claimed, as so many did in those days, an alleged purchase of the tract from the people.

The Court of Private Land Claims, refusing to recognize anything but the small patches on which the homes and small cultivated pieces were located, and to recognize none of the land used for grazing and held in common under the immemorial policy of the preceding government, approved only 1,422.62 acres for a large group of families, descendants of the 39 families originally settled on the land.

The Supreme Court of the United States affirmed the case, brought not by the grantees, but by a land and cat-

tle company, stating that under the law of its creation it could recognize no vesting of title in the community to common lands but only to the individual allotments assigned to each individual in severalty. It called attention to the fact that Congress alone could, as it had done when it had passed on other community grants directly, confirm title in common to the settlers of the San Joaquin del Rio de Chama community.

Whereupon, the company interested in the litigation abandoned it. It is very improbable that the families concerned themselves realized what was happening to them. It is quite improbable that the Government would have permitted the restricted and incomplete adjudication of the Court of Claims to stand unsupplemented had the matter been properly brought to its attention then or within a reasonable time.

Those families, heirs and descendants of the original 39 famlies, continued for years in undisturbed possession in the belief that the lands they grazed—and on several portions of which these growing family groups had established additional communities—belonged to them.

When the Federal Government finally exercised its domain over the land, those poor families appealing to lawyers for help, and without funds to finance an intelligent investigation, have been met with a firm denial of assistance in the belief that this case settled the matter once and forever.

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356-541—69

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 219

REIES LOPEZ TIJERINA, CRISTOBAL LOPEZ TIJERINA, AND JERRY NOLL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 434 Misc.

EZEKIAL DOMINGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 436 Misc.

ALFONSO CHAVEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI

OPINION BELOW

The opinion of the court of appeals is reported at 407 F. 2d 349.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1969. A petition for rehearing or rehearing en banc was denied on April 10, 1969. Mr. Justice White extended the time for filing the petitions for writs of certiorari to June 9, 1969. On that date the petitions in numbers 219 and 484 Misc. were filed. The petition in number 436 Misc. was filed on June 10, 1969, and is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment was sufficient to charge the offense of assaulting Forest Rangers in the performance of their official duties, in violation of 18 U.S.C. 111.

2. Whether the Forest Rangers were properly found to be within the scope of 18 U.S.C. 111, which punishes assaults upon various classes of federal officers designated in 18 U.S.C. 1114.

3. Whether the evidence was sufficient to show that petitioners Noll and Reies Tijerina aided and abetted in the assaults on the Forest Rangers.

4. Whether the instructions of the trial court on specific intent constituted plain error.

5. Whether the instructions correctly stated the elements of the crime of conversion of government property.

STATEMENT

After a jury trial in the United States District Court for the District of New Mexico, petitioners were convicted on one or more counts of an indictment charging assault upon Forest Rangers, in violation of 18 U.S.C. 111, and converting government trucks, in violation of 18 U.S.C. 641. Specifically, petitioner Reies Tijerina (hereafter Reies) was convicted on counts 1 and 2 alleging assault of Forest Rangers Taylor and Smith; petitioner Cristobal Tijerina (hereafter Cristobal) was convicted of assaulting Forest Ranger Taylor; petitioners Noll and Chavez were convicted on both assault counts and on two further counts, each of which charged conversion of a government truck. Petitioners received varying sentences of imprisonment, set forth at Pet. App. 3 n. 2.[1] The court of appeals affirmed (Pet. App. A).

The events in question arose out of a demonstration held at the Echo Amphitheatre Camp Ground in the Carson National Forest, New Mexico, on October 22, 1966. The demonstration was arranged by an organization known as Alianza Federal de Mercedes, of which Reies was the leader, to publicize the claims of a group of Spanish Americans to property rights which they asserted had been guaranteed by the 1848 Treaty of Guadalupe Hidalgo between the United States and Mexico (9 Stat. 922). Reies notified newsmen in advance of the scheduled "occupation," and reporters and photographers were present at the

[1] All references designated "Pet." or "Pet. App." are to the petition in No. 219.

scene. Films of the incidents which occurred were introduced into evidence (see P. Exs. 17 and 18).

On October 22, 1966, a caravan of vehicles carrying about three hundred people approached the entrance to the Echo Camp where some forty members of the Alianza had been gathered since early morning. Forest Rangers Taylor and Smith, who were unarmed and in uniform, attempted to stop the cars and collect the established entrance fee. The cars, however, sped past without stopping, forcing the Rangers to jump out of the way without collecting the entrance fees (Tr. 662–664, 724, 727, 810, 813).[2] Once inside the Camp Ground, the crowd became hostile and threatening toward the two Rangers. Amidst shouts, in Spanish, of "kill him" and "hang him," Rangers Taylor and Smith were violently seized[3] and pushed and dragged to a picnic table; the film in evidence shows Reies pointing to the table as this was going on (Tr. 668–669, 720–721, 814, 822, see Tr. 1195). Noll was sitting at the table. Acting as judge,[4] he charged the two officers with trespassing and being a nuisance, and told them to get out and stay out of the Echo Camp (Tr. 672, 676, 822–823). During these proceedings, Reies was standing on the table; when a reporter asked why the Rangers were arrested, he replied "On

[2] "Tr." refers to the transcript of proceedings at trial, a copy of which is on file with the Clerk of this Court in connection with the petition in No. 219.

[3] Ranger Taylor was grabbed by Cristobal and Chavez. Shortly thereafter, Ranger Smith was seized by Dominguez and Chavez (Tr. 668, 814).

[4] Noll had been "elected" judge a week before (Tr. 1149).

the order of the town" and "[f]or trespassing on the property of the town" (Tr. 1203). During the "trial," Captain Vigil of the New Mexico State Police approached Reies and asked what he wanted with the Rangers. Reies replied "publicity" (Tr. 673). Then Captain Vigil asked whether the Rangers were being held against their will or were free to go and Reies answered "They are free to go now" (Tr. 673).

After the Rangers were released, they started to take down license numbers. They were seized again and told by Reies that they would be rearrested if they did not leave. The Rangers were not allowed to take their trucks; Chavez informed them that the trucks had been impounded on Noll's order. Subsequently, Noll said they could take their personal belongings but not the trucks (Tr. 674–676, 823–824). The Rangers departed. The entrance to the camp ground was guarded by men with guns, and a flag and signs were put up proclaiming the spot to be a Spanish Republic (Tr. 825–827, 1150–1151). While Reies was talking with Captain Vigil, Ranger Smith came up to report that the trucks had been impounded (Tr. 782). Noll admitted this but, when Reies said he did not want them held, said he would release them. Cristobal then produced a set of keys, and another person produced the Rangers' walkie-talkie (Tr. 782–783). The Rangers' supervisor declined to permit them to take the trucks at this time, however, out of fear of the still angry and unruly crowd (Tr. 678–679, 781–784, 793–794, 1331–1334). The trucks were recovered, undamaged, after the crowd left. Chavez and

Dominguez each wore a deputy's badge and Cristobal had a deputy's card (Tr. 1224, 1227, 1251, 1306).

ARGUMENT

1. Petitioners contend that counts 1 and 2 of the indictment, which charged assault, failed to set forth all the elements of the offense charged. Count 1 reads:

> On or about the 22nd day of October 1966, at Echo Amphitheatre Camp Ground, Carson National Forest, Rio Arriba County, in the state and District of New Mexico, the defendants * * * willfully did forcibly assault, resist, oppose, impede, intimidate, and interfere with Walter Taylor, an officer of the Forest Service, United States Department of Agriculture, knowing him to be such officer, while the said Walter Taylor was engaged in the performance of his official duties. In violation of 18 U.S.C. 111 and 18 U.S.C. 2.

Count 2 charged the same offense, in the same language, as to Ranger Smith.

18 U.S.C. 111 protects any federal officer "designated in section 1114 of this title" against assault "while engaged in or on account of the performance of his official duties." Section 1114's coverage includes "any officer or employee of the Department of Agriculture * * * designated by the Secretary of Agriculture * * * to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals." Petitioners argue that the indictment did not set forth a necessary element of the offense under 18 U.S.C. 111, because it did not allege that the Forest

Rangers were employees described by Section 1114 or that, at the time of the incidents, they were engaged in the duties described in that Section. As the court of appeals held, however (Pet. App. A 8), the indictment was "a plain, concise and definite written statement of the essential facts constituting the offense charged" within the meaning of Fed. R. Crim. P. 7(c), adequate to meet this Court's two tests for sufficiency of indictments: (1) to apprise the accused of the nature of the offense alleged so that he may prepare a defense; and (2) to insure that in the event a future similar charge is brought, the courts will be able accurately to assess the defendant's claim of double jeopardy. *United States* v. *Debrow*, 346 U.S. 374, 376; see also *Russell* v. *United States*, 369 U.S. 749, 765–769. The details of the Rangers' appointments and duties were matters of proof which did not have to be alleged in the indictment.[5]

2. Petitioners also argue that Forest Rangers are not officers "designated in section 1114." The Secretary of Agriculture designated all officers and employees of the Forest Service assigned to field duty "to enforce Acts of Congress, and regulations promulgated pursuant thereto, for the protection, preservation, or restoration of game and other wild birds and animals on lands under the jurisdiction of the Forest Service" on August 20, 1940, 5 Fed Reg. 2940. That

[5] As the court of appeals noted (Pet. App. A 8), the government furnished a bill of particulars to petitioners stating the official duties of the Rangers. The court expressly found that "no bill of particulars was needed to save the indictment" (*ibid.*).

designation has never been revoked. Petitioners' principal contention is that it is nonetheless ineffective because both the Bureau of Biological Survey and the "functions of the Secretary of Agriculture relating to the conservation of wild life, game, and migratory birds" had been transferred to the Secretary of the Interior under the 1939 Congressional Reorganization Plan No. II (53 Stat. 1433–1434). Petitioners assert that the Secretary of Agriculture thus had no authority to designate those employees in 1940, when he purported to do so.

As the court below reasoned (Pet. App. A 9–10), however, the statutory predecessor of Section 1114 on which the Secretary of Agriculture based his designation, 54 Stat. 391, was enacted *after* passage of Reorganization Plan No. II. That statute—identical in all pertinent respects to Section 1114—clearly reflected a congressional understanding that the Secretary of Agriculture shares the responsibility for the "protection, preservation, [and] restoration of game and other wild birds and animals" with the Secretary of the Interior. As officers of the Forest Service, Forest Rangers are under the aegis of the Agriculture Department, 16 U.S.C. 551 *et seq.*, and subject to the regulations it has adopted (36 C.F.R. 200 *et seq.*)—in part, to carry out conservation tasks. Thus, the Forest Rangers in this case were within the coverage of Section 1114. "For the protection of the National Forest and the preservation of wild life therein * * * they acted officially to enforce the Land and

Water Conservation Fund Act of 1965, 16 U.S.C. §§ 460 (*l*)–4 to (*l*)–11, the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–531, and the regulations thereunder. Among their duties was the collection of the entrance fee at Echo." Pet. App. A 10.[6]

Petitioners also urge that Congress intended by 18 U.S.C. 111 and 1114 to protect only federal investigative and law enforcement personnel of the United States government, and that the 1940 designation—by embracing all Forest Service employees outside of Washington, D.C., including clerks and typists—is impermissibly broad. But Section 1114 clearly recognizes, as within the coverage of 18 U.S.C. 111, any person designated by the Secretary of Agriculture to "enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals." Field employees of the Forest Service are so designated. 5 Fed. Reg. 2940. Whatever may be the status of clerks, there can be no question but that the designation of the Forest Rangers themselves falls well within the intended purview of the congressional authorization.

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[6] The scope of the Rangers' duties was established by the government at trial. See P. Exs. 13 and 14. The trial judge properly charged that, if the jury found that the officers had been designated by the Secretary of Agriculture to enforce statutes relating to the conservation of wildlife, *and* that at the time of the incidents here involved the Rangers were carrying out those designated duties, the Rangers were within the coverage of 18 U.S.C. 111 and 1114. This instruction did not deprive the jury of its historic function to make the relevant factual determinations as to whether the Rangers were acting in the performance of their official duties as described in Section 1114.

3. Petitioners Reies and Noll contend (Pet. 13–19) that the evidence was insufficient to convict them for aiding and abetting the assaults on the two Rangers.

Petitioners state (Pet. 9) that "[n]o government witness saw any of the defendants as part of this caravan," but Reies himself testified that he held the caravan three or four miles south of Echo until he was sure the National Guard was not there (Tr. 1146, 1190). Moreover, the films show Reies directing the crowd where to take the officers, *i.e.*, to the table where Noll was acting as judge. The jury could reasonably find that Noll, in assuming the function of a judge, and Reies, in directing where the Rangers were to be brought by persons purporting to act as "deputies," were acting pursuant to a deliberate plan for the seizure and "trial" of the Rangers for the purpose which Reies stated to Captain Vigil, *i.e.*, publicity. These specific actions were ample to justify their convictions as aiders and abetters although neither personally touched the officers. See *Nye & Nissen* v. *United States*, 336 U.S. 613, 619. There was ample basis for declining to credit these petitioners' claim that they were merely trying to protect the Rangers. Obviously, the assault and seizure of the Rangers cannot be justified on First Amendment grounds.[7]

4. All petitioners challenge the trial court's instructions on specific intent, with reference to all

[7] We do not understand the other petitioners to dispute the sufficiency of the evidence on the assault counts; it showed that they had seized the Rangers and dragged them to the table where Noll and Reies were waiting.

counts on which they were convicted. The trial judge had charged (Tr. 1511–1512):

> Generally, it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done. So, unless the evidence in the case leads you to a different or contrary conclusion, you may draw the inference and find that the defendant intended all of the natural and probable consequences which one, standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act proven to your satisfaction to have been done—* * *.

As the court of appeals recognized (Pet. App. A 13), the above instruction has been criticized, and in some circumstances has been held to constitute error warranting reversal because of its possible effect on the jury with respect to the burden of proof. See cases cited at Pet. App. A 13 n. 20.

The instances in which the instruction has been held to be misleading are generally those where intent is not inherent in the act itself. Thus, the most frequent criticism has come in cases of income tax evasion where the act of failing to file a return or filing of an understated return might be attributable to negligence. *E.g., Bloch* v. *United States*, 221 F.2d 786 (C.A. 9); *Wardlaw* v. *United States*, 203 F.2d 884 (C.A. 5). Seizing and dragging an officer to a "trial table" is not such an equivocal act, even as to the two defendants—Reies and Noll—who were charged with aiding and abetting the assault. The judge specifically

told the jury that it could not find any defendant guilty solely because he was present and may have known that an offense was being committed. He charged that to be an aider and abettor a defendant must have participated in the venture willfully, as something he wished to bring about, and must have sought by his action to make it succeed (Tr. 1502). Moreover, immediately prior to the giving of the now challenged instruction, the trial judge correctly defined specific intent as knowingly to do an act which the law forbids, "intending with bad purpose either to disobey or disregard the law." He also correctly instructed that the burden of proof was on the government to prove the intent of each defendant individually beyond a reasonable doubt (Tr. 1511). Under these facts, giving the instruction did not amount to plain error.

5. Petitioners Noll and Chavez, who were convicted on both counts charging conversion of government property, contend that the trial court's instructions were deficient as to the essential elements of this offense. The trial court charged the jury that the term "convert[s] to his own use" means "to take personal property owned by another, and to knowingly and wrongfully deprive the owner of possession thereof" (Tr. 1501). Petitioners Noll and Chavez objected that this instruction omitted to charge that there must have been "some serious interference with * * * the possession" (Tr. 1521–1523), which they claim to be an essential element of the offense. The evidence is clear that the trucks were originally "im-

pounded" under the purported authority of Noll; that the keys were taken away; and that the Rangers were forbidden to take the trucks with them when they left. Having kept the Rangers from using the trucks, Noll's subsequent recantation (at Reies' direction) was no more effective to erase his offense than would be the act of a thief returning booty over a garden wall.

Moreover, the cases make clear that the intentional withholding of another's rightful use of a chattel, as here, may constitute an actionable conversion in tort even if there is no taking, removal or transfer. See Prosser, *The Nature of Conversion,* 42 Cornell L.Q. 168, 180–182 and cases cited; *Morissette* v. *United States,* 342 U.S. 246, 271–272. It is true that in tort law, where the remedy is damages, the interference with property must be sufficiently serious to justify a judgment that the *"actor * * * be required to pay the other the full value of the chattel."* See Prosser, *The Nature of Conversion,* 42 Cornell L.Q. 168, 173–174, and examples 37–39 at pages 180–181 (1957). There is, however, no reason to carry that concept over into the criminal field, where damage is relevant, if at all, only to the question of sentence.

In any event, the remarks of the judge on sentencing make it clear that he imposed sentences on the basis of the incident as a whole, with primary emphasis on the assault (Tr. 1656–1657). Taking into consideration the prior record of each defendant and his part in the proceeding, the court imposed substantial sentences on Noll and Reies Tijerina (Tr. 1658–1660) and a mild sentence on Chavez, equivalent to that of

Dominguez—who was not involved in the conversion (Tr. 1661–1662). It is evident that the convictions for conversion did not affect the sentence and the court below need not have reached those counts. Cf. *Benton* v. *Maryland*, No. 201, O.T., 1968, decided June 23, 1969.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Nos. 219, ~~434 Misc. and 436 Misc.~~

REIES LOPEZ TIJERINA, CRISTOBAL LOPEZ TIJERINA, JERRY NOLL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

The Government's statement that the films in exhibits 17 and 18 show Reies Tijerina "directing the crowd where to take the officers" is simply not true.

Points I and II of Petitioners' brief demonstrated that there was insufficient evidence to convict them for aiding and abetting the assaults on two Rangers (Pet. 13-21).

The Government in the main has ignored this argument. Its six-sentence rebuttal is so misleading that Petitioners have no alternative but to respond to it sentence by sentence. In particular the Government's position that the films provide evidence of aiding and abetting which is lacking in the oral testimony is not supported by the films themselves.

1. The Government cites pages 1146 and 1190 in asserting "Reies himself testified that he held the caravan three or four miles south of Echo until he was sure the National Guard was not there" (Res. 10). However, these pages do not show that Tijerina organized or held the caravan anywhere. They do show that Reies was part of a group which halted a few miles from Echo until it was ascertained there would be no confrontation with the National Guard. There is no testimony that either the caravan or the angry crowd were part of any group that had been organized by any of the defendants.

Furthermore, Reies Tijerina and Jerry Noll were not convicted for being members of a caravan; nor were they convicted for being part of a group that camped illegally on the National Forest grounds. They were convicted of aiding and abetting the assault of two forest rangers. The record is lacking any evidence to support the charge.

2. The Government's second sentence states that "the films show Reies directing the crowd where to take the officers, *i.e.*, to the table where Noll was acting as judge" (Res. 10). Anyone who has viewed the films could not make such a statement. After receiving the Government's brief, Petitioners requested and received permission to view the films which are now part of the record before this Court. Below is a somewhat detailed account which Petitioners compiled after viewing the films a number of times.

a. Exhibit 17

A KOB-TV news commentator and photographer testified that he arrived at the campsite between 6:00 and 7:00 A.M. on October 22, 1967. He shot over four hundred feet of film, and left around dark (Tr. 647, 651). He then edited and spliced the film he had taken. His final product for television was Exhibit 17—about three minutes or one hundred feet of silent film concerning the events in question. The film is spliced in many places as the result of cutting three-fourths of the original footage (Tr. 652-53).

The film began with two Rangers shaking hands with a grazing staff official. A small crowd had already gathered at the campsite. The scene then shifted to a long distance view of the approaching caravan. Then followed close up shots of the caravan crossing the cattle guard, the Rangers stepping aside to allow the caravan to pass and one tipping his hat, and the grazing official waving the trucks into the camping area. No defendant was present in this part of the film.

The film was spliced, and then showed a series of close ups of defendant Reies Tijerina parking his truck. The film was again spliced.

The next shot showed defendant *Cristobal* (not Reies) Tijerina grabbing a Ranger. A crowd had gathered around Cristobal and the Ranger; this crowd began to move up toward some unidentified place. Defendants Reies Tijerina and Noll were not present in this portion. Petitioners understand from Respondents' brief that they assert Reies was in front directing the crowd; "it showed that they had seized the Rangers and dragged them to the table where Noll and Reies were waiting" (Res. 10, fn. 7). The film simply does not support this assertion.

Following the shots of the crowd moving with the Ranger up to an unidentified place was a view of the backs of one Ranger flanked on either side by campers. Behind these three figures was the back of another man who may have been defendant Reies Tijerina. This man was in back of the action and not in position to direct the crowd or deputies where to take the Rangers. The movement of the crowd was clearly defined prior to the appearance of this unidentified man. The table to which the Rangers were eventually taken is not apparent in these earlier shots. Defendant Reies Tijerina did not appear in the film while the Rangers were at the table. Defendant Noll was sitting at the table to which the Rangers were brought. Noll at no time touched the Rangers.

The remainder of the film included among other things two separate incidents showing close ups of defendant Reies Tijerina. These incidents occurred after the assault and "trial" and offer no support that Reies aided and abetted the earlier assault.

b. Exhibit 18

Unlike Exhibit 17 which was a silent film, Exhibit 18 had sound. Newsman Dick Niffing testified that he and photographer Britton shot over four hundred feet of film and cut it to about nine minutes. One incident at least was placed out of its chronological sequence in the editing process (Tr. 760, 762, 766, 768).

The film was in large part a series of interviews with various persons present at the Amphitheater. It began with an interview of a local man. The film was spliced. Next appeared an incident out of time sequence which portrayed a Ranger talking with a man who refused to pay the recreation admission charge.

The film spliced again, and then showed the advancing and noisy caravan. After another splice, there was a scene of the Rangers being led to the table. The act of seizure itself was not as clearly portrayed in Exhibit 18 as in Exhibit 17. While the Rangers were being marched to the table, the newsman commented that they (the Rangers) were apparently being "arrested for trespassing." The commentator then asked one of the men holding the Ranger what would be done. The reply was "put them in jail" and "there's the judge." Throughout these incidents there was no shot of nor reference to Reies Tijerina.

Thus, the Government's statement that the "films show Reies directing the crowd where to take the officers . . ." (Res. 10) is simply not true. Film 18 does not even show defendant Reies Tijerina at this point.

Following the seizure of the Rangers, film 18 then showed an interview with defendant Noll at the table, and a scene with the two Rangers, the grazing official and the crowd at the table. Again defendant Reies Tijerina was not shown.

Following the scene at the table, the film showed defendant Tijerina walking with two law enforcement officers. The interviewer asked Reies Tijerina why the Rangers were arrested. Tijerina replied they had been arrested for trespassing on the town land of San Joachin on *orders of the town.* This explanation offered by Tijerina was not substantially different from that offered by the news commentator himself earlier in the film. It certainly offers no support that Reies Tijerina was an aider and abettor. Neither Tijerina nor the commentator were members of the town, both were observers of the unfolding events. Neither aided or abetted, although each offered an explanation for the facts which had occurred.

The interview between the commentator and Reies Tijerina continued. When questioned whether the Forest sign would be torn down and a sign proclaiming San Joachin Pueblo would be erected, Tijerina replied he didn't know but that he thought that would be "decided later today." Tijerina said that if the land was damaged during the course of the day and the court found the campers liable, they would pay damages. However, Tijerina asserted the land was the peoples and thus past court decisions which had refused to recognized the rights of Spanish-American under former Spanish and Mexican land grants were in error.

When talking to the Rangers Reies said the Rangers had been brave and were not responsible for what had happened. In explaining Tijerina added, "you can't stand in the way of the people." In this comment Tijerina neither adopted or rejected the action of the crowd. It was certainly not aiding or abetting the earlier assault.

Still later in the interview, the interviewer asked whether Tijerina planned to leave the Amphitheater as he did the weekend before or "stay permanently." Reies Tijerina replied to the effect that he would "stay here from now on unless driven out by force contrary to the provisions of the Treaty of Guadalupe-Hildalgo." When asked how they planned to get the case of land ownership into court, Tijerina replied that the campers expected that "they [law enforcement officers] will come out with a court order" charging the campers with trespassing. If the title claim was lost in the lower court, they would "appeal to the Supreme Court."

There was another splice. The next scene showed a large sign proclaiming the Pueblo of San Joachin del Rio de Chama posted to cover much of the sign identifying

Carson National Forest. There was another splice. The film closed with another shot of Reies Tijerina and then some general shots of campers preparing meals, etc.

3. Sentence 3 of the Government's response states that:

> "[t]he jury could reasonably find that Noll, in assuming the function of a judge, and Reies, in directing where the Rangers were to be brought by persons purporting to act as 'deputies', were acting pursuant to a deliberate plan for the seizure and 'trial' of the Rangers . . ." (Res. 10)

What the Government has done is coupled the *false statement (i.e.* Reies Tijerina was directing the crowd) with a conspiracy theory (now phrased as a "deliberate plan for the seizure") which was rejected by the jury (returned a mistrial on the conspiracy count). The jury did not find defendants "were acting pursuant to a deliberate plan" (Res. 10). The jury found defendant Cristobal Tijerina and Dominquez guilty of assault only on the Ranger each respectively touched; defendant Chavez was found guilty of both assaults because he touched both Rangers. Contrary to what the Government now attempts to argue the jury did not return its verdicts on the basis of a "deliberate plan."

4. Sentences four through six are conclusions resting finally upon the false assertion that the films offer evidence that defendants Noll and Reies Tijerina aided and abetted the assault. As has been indicated above the films simply do not show Reies Tijerina "directing the crowd where to take the officers" (Res. 10).

CONCLUSION

Points I and II of Petitioners' brief demonstrated that defendants Reies Tijerina and Jerry Noll were convicted of aiding and abetting an assault in the absence of any evidence to support the charge. Apparently, conceding that the oral testimony does not support the charge, the Government answered by saying there was sufficient evidence in the films. Petitioners have viewed the films in detail and deny the Government's assertion. Consequently, if doubt exists in this Court's mind, Petitioners respectfully urges the Court to review this specific aspect of the record. It will show defendant Noll presided as "judge" of the "trial" after the Rangers were seized. It will not show defendant Reies Tijerina participating in the immediate events preceding, surrounding, or following the assaults.

Respectfully submitted,

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